CASE NO. 93-6431

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

JOHN EARL BUSH,

Petitioner,

vs.

HARRY K. SINGLETARY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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November 18, 1993

QUESTIONS PRESENTED

I

WHETHER THE ELEVENTH CIRCUIT'S AFFIRMANCE OF THE STATE COURT "ENMUND FINDINGS" IS IN CONFLICT WITH THIS COURT'S PRECEDENT

II

WHETHER THE ELEVENTH CIRCUIT'S DETERMINATION THAT NO PREJUDICE HAS BEEN SHOWN REGARDING AN ALLEGED IMPROPER INSTRUCTION VIOLATES ANY FEDERAL CONSTITUTIONAL RIGHT

III

WHETHER THE ELEVENTH CIRCUIT EMPLOYED THE CORRECT STANDARD WHEN ASSESSING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER STRICKLAND v. WASHINGTON

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OPINION BELOW

The state notes that the opinion below has been reported as Bush v. Singletary, 988 F.2d 1082 (11th Cir. 1993). All other prior opinions are included in petitioner's appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's statement regarding the pertinent provisions.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent rejects petitioner's statement of the case. The statement is an editorial replete with slanted facts. The Eleventh Circuit's opinion, attached as an appendix to petitioner's petition contains an accurate account of the procedural history, the facts adduced at trial and the findings of fact made by the district court. Bush v. Singletary, 988 F. 2d 1082. (11th Cir. 1993). Respondent's appendix contains the testimony of trial counsel, which was presented at the federal evidentiary hearing.

REASONS FOR DENYING THE WRIT

POINT I

THE ELEVENTH CIRCUIT'S AFFIRMANCE OF THE STATE COURTS FINDINGS REGARDING PETITIONER'S PARTICIPATION IN THE CAPITAL MURDER ARE CONSISTENT WITH THIS COURT'S PRONOUNCEMENTS IN ENMUND v. FLORIDA, CABANA v. BULLOCK, AND TISON v ARIZONA.

Petitioner alleges that no state court made any factual findings regarding his mental state at the time of the murder.[1] He further argues that the Eleventh Circuit did not correct the deficiency, thereby creating an alleged conflict between the circuit court and this Court's authority regarding Enmund/Tison findings.[2] The Eleventh Circuit's opinion in addition to the three other courts that have ruled on this issue, the district court, the Florida Supreme Court, and the trial court, establishes that no conflict exist and review by this Court is not necessary.

The circuit court began it's analysis with recognition of the culpability requirement of Enmund v. Florida, 458 U.S.782 (1982), i.e., the capital defendant must have either killed, attempted to kill or intended to kill. Bush v. Singletary, 988 F.2d 1082, 1087 (11th Cir. 193), citing to Enmund (citations omitted.) Such factual findings may be made at any level of the

[1] The evidence at trial established that petitioner, an active participant in the crimes committed against Julia Slater, was not the actual murderer.

[2] Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987).

state court proceedings, and such findings are entitled to a presumption of correctness. Cabana v. Bullock, 474 U.S. 376 (1986). Recognizing that only a small minority of jurisdictions reject a sentence of death absent an intent to kill, this Court stated that the mental culpability requirement is satisfied with a finding that the capital defendant was a major participant in the felony and his/her actions evidenced a reckless indifference to human life. Tison v. Arizona, 481 U.S. 137 (1987). Bush, 988 F.2d at 1087.

Petitioner's argument that no state court made the factual findings regarding mental culpability is belied by the trial court's sentencing order:

> Of course, the only version of the actions that took place that night that we have come from your statements both out of court and in court. I guess we don't have to believe your statement, but since there is no other evidence we can't act upon anything that wasn't in evidence. So we must assume that you were an accomplice in the offense and we must assume from the evidence of Dr. Wright, the actual death occurred as a result of the bullet wound and the only evidence, direct evidence that we have is that another person imposed that. But the third part here is, and the Defendant's participation was relatively minor. The evidence that was presented in this case is that you were together with these other people during this entire evening, that it was your car, that you were doing all the driving and that it was your weapon. The evidence then shows that when you stopped down in that road you and Parker got out of the car and took the girl back and between the two of you did her in.

> You took the first step by stabbing her. You said that you did not intend to kill her. Apparently the jury disbelieved that and I am privileged to disbelieve it as well. In any event, what you did, stabbing her, making her fall to the ground, facilitated and cooperated with Parker in what he did next, and therefore in my opinion there is no way to say what you did was relatively minor. emphasis added).

Bush, 988 F.2d at 1087.

The Florida Supreme Court reaffirmed the trial court's findings:

> ...Here we do not have a mere passive aider and abettor as in Enmund, where the only participation by Enmund was as driver of the getaway car from what he supposed was only a robbery and not a murder. The facts of this case show that Bush was a major, active participant in the convenience store robbery and his direct actions contributed to the death of the victim. The degree of Bush's participation is sufficient to support a finding that his involvement constituted the intent or contemplation required by Enmund.

Bush v. State, 461 So. 2d 936, 941 (Fla. 1984)

The district court reiterated the findings made by the state courts. (Petitioner's appendix H pgs.43-45).

After the reviewing all the above, the 11th Circuit[3] determined that the trial judge's findings were constitutionally sound under Enmund. Bush, 988 F. 2d at 1088.

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[3] Equally without merit is petitioner's assertion that the Florida Supreme Court initially recognized Bush's statement, regarding his lack of intent to kill as the truth. The Court then decided to ignore that "finding" and uphold the sentence of death anyway. The argument is incredulous. The basis for this

The trial court's relevant findings include petitioner's actual participation in removing Ms. Slater from the car, stabbing her and then standing there while she was then executed. Other evidence to rebut his claim that he was an unwilling participant include the following; petitioner spent the entire evening with his three co-defendants agreeing to participate in the robbery. He stated that he knew what he was doing the entire evening. Bush v. Singletary, 988 F. 2d at 1092. He gave several conflicting stories regarding his involvement that evening. Bush, 461 So. 2d 937. He owned the murder weapon, which he latter disposed of, as well as the getaway car. He drove the car that entire evening. Bush, 988 F. 2d at 1092. His car was stopped by the police twice that evening shortly after the murder. Petitioner appeared very calm and collected to the police as he did not arouse suspicion. Id, at 1093. Petitioner's actions demonstrated his major participation in the felony as well as his own intention that Ms. Slater be killed. The trial court's rejection of Petitoner's self serving statement to the contrary is supported by the record.

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claim is the Court's characterization of Bush's four taped statements "as the only known version of the events" that are presented in the light most favorable to him. Bush v. State, 461 So. 2d 936, 937. (Fla. 1984).

As noted by the 11th Circuit, the Court was simply recounting Bush's claim, affording him the benefit of any doubt. Bush v. Singletary, 988 F. 2d 1082, 1088. (11th Cir. 1993). In reality the Supreme Court upheld the trial court's rejection of Bush's self-serving interpretation of his actions.

Petitioner has failed to demonstrate that the state courts did not find the necessary mental culpability.[4] The trial court's findings as well as the Florida Supreme Court's findings could not be more explicit.[5] Petitioner has failed to demonstrate that any conflict exists to warrant review by this Court.

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[4] The district court determined that the petitioner's participation established not only reckless indifference but also the intent as described in Enmund.

[5] In Tison v. Arizona, 481 U.S. 137 (1987) this Court noted that the two requirements of major participation in a felony and intent to kill/reckless indifference often overlap. Id, 481 U.S. at 158 n. 12.

ISSUE II

PETITIONER HAS FAILED TO DEMONSTRATE THAT THE JURY WAS IMPROPERLY INSTRUCTED OR THAT ANY PREJUDICE RESULTED FROM THE INSTRUCTIONS GIVEN

Petitioner claims that he is entitled to habeas relief based on an alleged improper jury instruction during the penalty phase. The challenged instruction pertained to the number of votes required for a jury recommendation for life as opposed to the number required for a recommendation of death. The trial court read the standard jury instruction which stated the following;

> In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury. The fact that the determination of whether a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence and all of it, realizing the human life is at stake and bring to bear your better judgement in reaching your advisory sentence.
>
> Now, if the majority of the jury determines that John Earl Bush should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of blank advised and recommends to the court that it impose the death penalty upon John Earl Bush. On the other hand, if by six or more votes the jury determines that John Earl Bush should not be sentenced to death, your advisory sentence will be the jury advise and recommends to the court that

> it impose a sentence of life imprisonment upon John Earl Bush without the possibility of parole for twenty-five years.
> You will in just a moment retire to consider your recommendation. When seven or more of you are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to this court...

(R 1290-1291).

The Florida Supreme Court acknowledged that the jury instruction contained some objectionable language however any error was corrected since the court made it clear that a life recommendation only required a vote of six. Bush, 461 So.2d at 941. Since the body of the instruction was correct, there was no indication that the jury was confused and there was no objection to the instruction, the court concluded that no prejudice had been established. Id. The district court and the Eleventh Circuit court also found that the jury was never confused as to the number of votes required or that they ever were split six to six regarding their decision[6] , consequently, the petitioner did not carry his burden of showing prejudice. Bush, 988 F. 2d at 1089; (See also petitioner's appendix H pgs. 72-73).

Petitioner claims that the challenged instruction was so egregious that the Eleventh Circuit's affirmance in essence is in conflict with Mills v. Maryland, 486 U.S. 367 (1988); Caldwell v. Mississippi, 472 U.S. 320 (1985) and McKoy v. North Carolina,

[6] The jury was instructed that their decision could be made by a single ballot. (R 1290).

494 U.S. 433 (1987). Petitioner is mistaken as all three cases are distinguishable on various grounds. In Caldwell, supra, this Court determined that the jury instructions were improper/inaccurate as they incorrectly defined the jury's role in Mississippi's sentencing scheme. The jury was explicitly told that there role was minimal. There did not exist other instructions to counter that incorrect statement. In Mills this Court determined that the entire sentencing scheme via the instructions and verdict form was unconstitutional as a jury was precluded form considering mitigating evidence. Id. Similarly in McKoy, North Carolina's sentencing scheme was found constitutionally infirm based on Mills. Conversely in the instant case, the instruction under attack is not incorrect, as a whole it correctly states what the law is regarding the required number of votes for both a life or death recommendation. Bush, 461 So. 2d at 941. Nor does the offending statement impermissibly infringe on any constitutional guarantees, i.e., preclude the jury from considering any mitigating evidence, improperly shift the burden of proof to the defendant.

The above cases can also be distinguished based on their procedural posture before this court. All three cases were before this Court on direct review. Caldwell, 472 U.S. at 323; Mills, 486 U.S. 369; McKoy, 494 U.S. at 437-438. The instant case appears before this Court on collateral review. As this Court recently stated in Brecht v. Abrahamson, 507 U.S. __, 123 L. Ed.2d 353, 113 S. Ct. __ (1993), the test for determining

harmless error is "whether the error had substantial and injurious effect or influence in determining the jury's verdict" Brecht, 123 L. Ed. 2d 373 citing Kotteakos v. United States, 328 U.S. 750 (1946). The burden is on the petitioner to establish actual prejudice. Brecht. Furthermore, to establish federal relief based on an improper jury instruction, the instruction must not only be undesirable, erroneous or even universally condemned, it must violate a constitutional right. Cupp v. Naughten, 414 U.S. 141 (1973). With these principles and distinguishing factors in mind, petitioner cannot establish that any conflict exists between the instant case and past precedent form this Court.

All the courts reviewing this claim determined that the trial court's instructions as a whole properly stated the law. Such an analysis is required as this Court stated, a jury instruction must be viewed in context of the overall instructions. Naughten. Given that the trial court did specifically instruct the jury that a six to six vote was sufficient for a life recommendation[7], and there was no evidence that they were confused or deadlocked at six, petitioner cannot establish any actual prejudice. The circuit court's rejection of

[7] The fact that instruction was not objected to nor brought forth until appellate review, demonstrates that the probability that the alleged error substantially affected the jury deliberations is remote. Henderson v. Kibbe, 431 U.S. 145, 155 (1977).

this claim is consistent with precedent from this Court. Brecht; Naughten. Review must be denied.

ISSUE III

THE ELEVENTH CIRCUIT'S DETERMINATION THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IS CONSISTENT WITH PRECEDENT FROM THIS COURT

Petitioner attempts to create conflict between the instant case and Strickland v. Washington, 466 U.S.. 668 (1984) by relying on the dissenting opinion and totally ignoring the factual findings found by the district court and upheld by the circuit court. Bush v. Singletary, 988 F.2d at 1089-1090. The Eleventh Circuit's opinion details the factual findings of the district court. Id. Trial counsel did investigate petitioner's background[8] and made a decision that evidence of poor background and family life was not beneficial enough to risk the introduction of damaging rebuttal testimony. Such a decision is constitutionally sound. Burger v. Kemp, 483 U.S. 776, 790-795. (1987).

Trial counsel also made a strategic decision not to pursue mitigating evidence based on mental deficiency, passive nature or intoxication. Such was based on the fact that there was simply no evidence to support same,[9] consequently trial

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[8] Contrary to petitioner's distorted rendition of the facts developed at the evidentiary hearing, trial counsel testified that he discussed potential mitigating evidence with family members, and with a psychiatrist. His three discussions with the doctor included reference to the police reports, petitioner's statements and the statements from the co-defendants.

[9] It should be noted that present counsel abandoned any claim dealing with petitioner's competency or alleged violation of Ake v. Oklahoma, 470 U.S. 68 (1985). Bush v. Singletary, 988 F. 2d 1082, 1085-1086 n.1 (11th Cir. 1993).

counsel's limitation on investigation was reasonable. Bush, 988 F. 2d 1090-1091, Burger, 483 U.S. at 795. Petitioner distorts the evidentiary hearing testimony of trial counsel.[10] Bush, 988 F. 2d at 1090-1093. Furthermore, petitioner focuses strictly on what trial counsel did not pursue without consideration of what counsel did present. Such an analysis is incomplete and contrary to the dictates of Strickland. Given the lack of other mitigating evidence in conjunction with petitioner's confessions to the felonies, trial counsel decided to pursue an Enmund/Tison[11] defense. Given that the defense was consistent with petitioner's statement, trial counsel's actions were reasonable.

The Eleventh Circuit's determination regarding prejudice also comports with this Court's prior decisions. The circuit court found no prejudice based on the fact that most of the alleged mitigation was simply not credible, as it was rebutted by petitioner himself. Bush, F. 2d 988 at 1093. The Florida Supreme Court made a similar observation when denying this claim. Bush v. Wainwright, 505 So. 2d 409, 411 (Fla. 1987).

Furthermore, petitioner himself demonstrated at trial that he was anything but remorseful or passive. Bush v. Singletary, 988 F. 2d 1082, 1091 (11th Cir. 1993).

[10] When asked specifically questions regarding whether he investigated D.O.C. records and school records, trial counsel did not have a strategic reason for not pursuing that information. (Respondent's appendix pg.319). However, trial counsel did discuss what investigation he did pursue and why certain avenues were abandoned.

[11] See n. 2

Given that the trial court is allowed to assign what ever weight deemed appropriate to the mitigating evidence, Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982), the district court and circuit court's analysis/ characterization of the evidence is sound. Furthermore a prejudice determination must take into account not only the outcome but whether the result of the proceeding was unfair or unreliable. Lockhart v. Fretwell, 506 U.S. __, 122 L. Ed. 2d 180, 189, 113 S. Ct. __ (1993). The proffered testimony[12] was either rebutted or of little value. The absence of this information at trial did not result in an unfair or unreliable sentencing hearing. The Eleventh Circuit's determination that Petitoner received effective assistance of counsel is consistent with precedent from this Court. Strickland; Burger; Fretwell. Review must be denied.

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[12] The testimony consisted of general positive affirmations regarding petitioner's family relationships. A mental health expert also testified that petitioner was not psychotic but future psychosis was possible. There were differing opinions regarding petitioner's IQ. One doctor testified that petitioner had an IQ of 88-91. Petitoner has obtained his GED in prison.

There was also conflicting evidence regarding whether or not Petitoner was physically abused as a child.

CONCLUSION

WHEREFORE, based on the above articulated facts and relevant case law, respondent respectfully submits that petitioner has failed to establish that any conflict exists between the Eleventh Circuit's opinion and any pertinent case from this Honorable court. As such petitioner's request for review should be DENIED.

NO 93-6431

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Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I, Celia A. Terenzio, a member of the Bar of this Court, hereby certify that on this 18th day of November, 1993, a copy of the Petition for Writ of Certiorari in the above-entitled case was furnished by United States Mail to: BILLY H. NOLAS, ESQUIRE and JULIE D. NAYLOR, ESQUIRE, P. O. Box 4905, Ocala, Florida 34478, counsel for the petitioner herein. I further certify that all parties required to be served have been served.

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